CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 581

ADOLPH B. SPRECKELS, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 3, 1941.

CERTIORARI GRANTED OCTOBER 20, 1941.

No. 9682

United States

Circuit Court of Appeals

For the Ninth Circuit.

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Docket No. 95639

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES

For Taxpayer:

HERBERT W. CLARK, Esq.,
LEON de FREMERY, Esq.,
WALTER SLACK, Esq.,

For Comm'r.:

T. M. MATHER, Esq.,
E. M. WOOLF, Esq.

DOCKET ENTRIES

1938

Sep. 26—Petition received and filed. Taxpayer notified. (Fee paid)

" 26—Copy of petition served on General Counsel

Nov. 3—Answer filed by General Counsel.

" 3—Request for Circuit hearing in San Francisco filed by General Counsel.

" 9—Notice issued placing proceeding on San Francisco calendar. Copy of answer and request served.

1939

Mar. 25—Hearing set May 29, 1939 in San Francisco, California.

Jun. 8—Hearing had before Mr. Disney on merits. Submitted. Petitioner moves to amend petition—granted. Motion to consolidate with 94621 granted. Respondent allowed usual time to file amended answer. Application to file an amended petition filed and served on the parties. Briefs due 7/25/39—reply 8/15/39. Called 5/25/39.

" 15—Answer to amended petition filed by General Counsel.

" 27—Transcript of hearing of June 8, 1939 filed.

Jul. 22—Brief filed by General Counsel.

" 24—Brief filed by taxpayer. 7/24/39 copy served.

Aug. 10—Reply brief filed by General Counsel.

1939

Aug. 17—Notice to send all future notices to Walter Slack filed by Herbert W. Clark.

" 25—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 8/28/39 granted.

" 29—Copy of motion and reply brief served on General Counsel.

1940

May 21—Findings of fact and opinion rendered, R. L. Disney, Div. 4. Decision will be entered under Rule 50.

Jun. 19—Computation of deficiency filed by General Counsel.

" 24—Hearing set July 24, 1940 on settlement.

Jul. 3—Computation of deficiency filed by taxpayer. 7/5/40 copy served.

" 24—Hearing had before Mr. Smith on settlement under Rule 50. Respondent concedes petitioner's recomputation correct. Referred to Mr. Disney for decision.

" 31—Transcript of hearing of July 24, 1940 filed.

Aug. 5—Decision entered, R. L. Disney, Div. 4.

Oct. 19—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

" 25—Notice of filing petition for review (affidavit attached) filed by taxpayer. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

1940.
Oct. 25—Statement of points filed by taxpayer with affidavit of service.
" 25—Designation of portions of the record filed by taxpayer. Affidavit of service attached.
[2]

United States Board of Tax Appeals
Docket No. 95639

ADOLPH B. SPRECKELS,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:E:1-JHU:90D), dated July 20, 1938, and as a basis of his proceedings alleges as follows:

1. Petitioner is an individual, with his principal office at 2 Pine Street, San Francisco, California. The return for the period here involved was filed with the Collector for the First District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the petitioner on July 20, 1938. [3]

3. The taxes in controversy are income taxes for the calendar year 1934, and in the amount of $4,904.47.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner erred in increasing the petitioner's distributive share of the income received by the Trustees under the will of Adolph B. Spreckels, deceased, by the amount of $9,431.67. Said error is occasioned by erroneously adjusting the income of said Trustees by the following items:

A. The amount of $39,622.99, erroneously alleged to be taxable dividends received by said Trustees from Monarch Investment Company.

B. The amount of $16,967.02, erroneously disallowed as a deduction for interest paid by said Trustees on an income tax deficiency of the estate of Adolph B. Spreckels, deceased.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During the year 1934 the petitioner was a beneficiary of said trust under the will of Adolph B. Spreckels, deceased.

(b) During the calendar year 1934 said Trustees received from Monarch Investment Company, a corporation, distributions in the amount of $153,000, all of which [4] distributions were made by said corporation from capital, and no part of said distributions was made by said corporation out of its earnings or profits accumulated after February

28, 1913. The Commissioner has erroneously determined that said distributions were made out of capital only to the extent of $113,377.01, and that the balance thereof, or $39,622.99, was made out of earnings accumulated after February 28, 1913.

(c) During the calendar year 1934 said Trustees paid interest in the amount of $16,967.02 on income tax deficiencies of the estate of Adolph B. Spreckels, deceased, for the years 1926 and 1931, for which said Trustees were liable as transferees of said estate. The Commissioner has erroneously disallowed the deduction of said interest on the ground that it represents an expense of said estate and not of said trust.

(d) Petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for taxes paid under the following circumstances:

During the calendar year 1934 petitioner sold stocks and bonds owned by him and as required by

[5] Title VIII of the Revenue Act of 1926 as amended, and by the laws of the several states, petitioner during said calendar year paid stamp taxes on said sales amounting to $5,693.67. During said calendar year 1934 petitioner made sales of produce for future delivery, and, as required by said Title VIII of the Revenue Act of 1926 as amended, petitioner during said calendar year paid stamp taxes on said last mentioned sales amounting

to $1,525.62; that petitioner filed his income tax return for the calendar year 1934 on the 15th day of March, 1935, showing an income tax due thereon in the sum of $37,897.60. Petitioner paid the income tax shown due upon said return in installments as follows: $9,000 on March 15, 1935, $474.40 on May 18, 1935, $9,474.40 on June 12, 1935, $9,474.40 on September 11, 1935, and $9,474.40 on December 10, 1935; that thereafter and on the 23rd day of December, 1937, petitioner duly filed with the Collector of Internal Revenue at San Francisco, California, a claim for the refund of $4,087.61 income tax overpaid for the calendar year 1934 by reason of petitioner's failure to deduct the above mentioned stamp taxes in computing and paying his Federal income tax for said calendar year; that thereafter and on the 20th day of July, 1938, and in the ninety day letter hereunto attached marked Exhibit "A," the respondent conceded that [6] petitioner was entitled to the deduction of $7,219.29 for stamp taxes paid as hereinbefore stated; that by reason of petitioner's right to take an additional deduction for said sum of $7,219.29 in stamp taxes paid petitioner is entitled to a refund on account of his income tax for said year in the sum of $3,650.36.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum

of $3,650.36, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of this petition, and that petitioner is entitled to a refund of said sum of $3,650.36.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building,
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [7]

State of California,
County of Los Angeles—ss.

Adolph B. Spreckels, being first duly sworn, says;

That he is the Petitioner above named; that he has read the foregoing Petition and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information or belief, and that those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 21 day of September, 1938.

[Seal] CHARLES G. GOODMAN
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 13, 1942. [8]

EXHIBIT "A"

Treasury Department
Washington
Office of
Commissioner of Internal Revenue
Address Reply To
Commissioner of Internal Revenue
And Refer To

Jul 20 1938

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Sir:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1934 discloses a deficiency of $1,254.11 as shown in the statement attached.

In accordance with section 272(a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the

closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner.
By JOHN R. KIRK
Deputy Commissioner.

Enclosures:
Statement
Form 870 [9]

STATEMENT

IT:E:1
JHU:90D

Mr. Adolph B. Spreckels,
2 Pine Street,
San Francisco, California.

Tax Liability for Taxable Year Ended December 31, 1934

Income tax
Liability—$39,151.71
Assessed—$37,897.60
Deficiency—$1,254.11

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's report dated March 4, 1936; to your protest dated June 4, 1936; to the

statements made at the conference held July 15, 1936; and to your claim for refund of individual income tax in the amount of $4,087.61.

If a petition to the United States Board of Tax Appeals is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition to be considered by the Board in any redetermination of your tax liability. If a petition is not filed, the claim for refund will be disallowed and official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

Adjustments to Net Income

Net income as disclosed by return	$121,593.86
Unallowable deductions and additional income:	
(a) Dividends	9,431.67
Total	$131,025.53
Nontaxable income and additional deductions:	
(b) Taxes paid	6,518.49
Net income adjusted	$124,507.04

[10]

Explanation of Adjustments

(a) Your share of adjusted income from Walter D. K. Gibson, et al, Trustees under will, Estate of Adolph B. Spreckels, deceased (Trust), has been determined to be $37,664.21, taxable as dividends. As you included $28,232.54 as dividends from the trust in your return, the amount reported has been increased by $9,431.67.

In determining the correct net income of the trust the amount reported on the fiduciary return was adjusted as follows:

Net income reported on fiduciary return, form 1041	$194,626.17
Add:	
1. Dividends	39,622.99
2. Interest deduction disallowed	16,967.02
Net income adjusted	$251,216.18
Distribution of income:	
Mrs. Alma Spreckels	$134,454.88
Adolph B. Spreckels	37,664.21
Mrs. Alma Spreckels Rosekrans	37,664.21
Mrs. Dorothy S. Dupuy	38,432.88
Estate of Adolph B. Spreckels, Deceased (Trust)	3,000.00
Total	$251,216.18

1. Dividends from the Monarch Investment Company have been allocated as shown below:

Date Paid	Amount Paid	Taxable (From Corporate Earnings Since February 28, 1913)	From Capital	Percent Taxable
March 3, 1934	$130,000.00	$16,622.99	$113,377.01	
November 13, 1934	23,000.00	23,000.00	—	
	$153,000.00	$39,622.99	$113,377.01	25.8974

[11]

As no dividends from the Monarch Investment Company were reported in the fiduciary return as income, the adjustment of this item increases dividends by $39,622.99.

2. The deduction of $16,967.02 for interest paid by the trustees of the trust on income tax deficiencies of the Estate of Adolph B. Spreckels, deceased, has been disallowed, for the reason that the amount represents expense of the estate and not of the trust. See the decision of the United States Board of Tax Appeals in Helen B. Sulzberger et al, 33 B. T. A. 1093.

In determining the fiduciary income taxable to the beneficiaries the examining officer included in distributable income $3,000.00, representing an annuity payment to Anna De Bretteville. As this amount is held to be taxable to the trust, your distributive fiduciary income as adjusted by the report has been reduced by one sixth of $3,000.00 or $500.00.

(b) The deduction of $700.80 for taxes paid on whiskey withdrawn from bonded warehouses has been disallowed in accordance with Income Tax Ruling 2768, Cumulative Bulletin XIII-1, 54 (1934).

An additional deduction of $7,219.29 for taxes paid on the sales of securities and commodities has been allowed in connection with your claim.

You contended that total stamp taxes paid amounted to $7,299.29. The information submitted by the examining officer indicates that the above-stated amount includes securities exchange regis-

tration fee, not in excess of $80.00. This is not deductible as a tax. See Income Tax Ruling 3161, Internal Revenue Bulletin, February 14, 1938, No. 7. The remainder of the taxes claimed, $7,219.29, is held to be deductible in accordance with section 23(c)2 of the Revenue Act of 1934 and General Counsel's Memorandum 18245, Cumulative Bulletin, 1937-1, 70.

Computation of Tax

Net income adjusted		$124,507.04
Less:		
Personal exemption	$ 2,500.00	
Credit for dependents	933.33	3,433.33
Balance (surtax net income)		$121,073.71

[12]

Brought forward		$121,073.71
Less:		
Interest on Liberty Bonds	$ 13,554.94	
Dividends	101,786.71	
Earned income credit	300.00	115,641.65
Net income subject to normal tax		$ 5,432.06
Normal tax at 4% on $5,432.06		217.28
Surtax on $121,073.71		38,958.33
Total tax		$ 39,175.61
Less:		
Income tax paid at source		23.90
Correct income tax liability		$ 39,151.71
Income tax assessed:		
Original, account #201806, May 1935		37,897.60
Deficiency of income tax		$ 1,254.11

[Endorsed]: U. S. B. T. A. Filed Sept. 26, 1938.

[13]

[Title of Board and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above-named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income taxes for the calendar year 1934, as alleged in paragraph 3 of the petition. For lack of information denies that the amount of tax in controversy is $4,904.47, as alleged in paragraph 3 of the petition.

4. (a), A and B. Denies that the Commissioner erred in the determination of tax, set forth *the* the said notice of deficiency, as alleged in subparagraph (a) of paragraph 4 of the petition, and [14] in subparagraphs A and B of subparagraph (a) of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) Admits that during the calendar year 1934, the trustees of the trust under the will of Adolph B. Spreckels, deceased, received from Monarch Investment Company, a corporation, distributions in

the amount of $153,000.00, and that the Commissioner has determined that of said distributions the amount of $39,622.99 was made out of earnings accumulated after February 28, 1913, as alleged in subparagraph (b) of paragraph 5 of the petition. Denies that said determination by the Commissioner was in error and denies all other allegations contained in subparagraph (b) of paragraph 5 of the petition.

(c) Admits that the Commissioner has disallowed as a 1934 deduction, claimed by the trustees of the trust under the will of Adolph B. Spreckels, deceased, the amount of $16,967.02, for interest on income tax deficiencies of the estate of Adolph B. Spreckels, deceased, on the ground that such a payment represented an expense of the estate and not of the trust, as alleged in subparagraph (c) of paragraph 5 of the petition. Denies that the Commissioner erred in disallowing said deduction and, for lack of information, denies all other allegations contained in subparagraph (c) of paragraph 5 of the petition. [15]

(d) Admits that the petitioner, in making his completed income tax return for the calendar year 1934, showed a net income subject to Federal income tax in the sum of $121,593.86, and showed an income tax due thereon in the amount of $37,897.60, as alleged in subparagraph (d) of paragraph 5 of the petition. Admits that the Commissioner, in his ninety-day letter, conceded that the petitioner was entitled to a 1934 deduction of $7,219.29 for stamp taxes paid, as alleged in subparagraph (d) of para-

graph 5 of the petition. For lack of information, and for other reasons, denies all other allegations contained in subparagraph (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not heretofore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal be denied.

Signed J. P. WENCHEL,
TMM
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
ARTHUR L. MURRAY,
Special Attorneys,
Bureau of Internal Revenue.

ALM/F 10-28-38

[Endorsed]: U. S. B. T. A. Filed Nov. 3, 1938.

[16]

[Title of Board and Cause.]

APPLICATION FOR LEAVE TO FILE AMENDMENT TO PETITION

To the United States Board of Tax Appeals:

Now comes the petitioner above named and asks leave to file an amendment to his petition in the above entitled proceeding on the ground that the

same is necessary for a proper presentation of petitioner's appeal.

Dated: San Francisco, June 7th, 1939.

HERBERT W. CLARK
WS
LEON de FREMERY
WS
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner

Granted June 8, 1939.

(Signed) R. L. DISNEY
Member U. S. Board of Tax Appeals.

[Endorsed]: U. S. B. T. A. Filed at hearing June 8, 1939. [17]

[Title of Board and Cause.]

AMENDMENT TO PETITION

Now comes the petitioner above named and leave having first been obtained, files this amendment to his petition in the above-entitled proceeding and alleges as follows:

I

That the determination of tax set forth in the notice of deficiency, a copy of which is attached to the original petition, is erroneous in the following

particular in addition to the errors specified in the original petition, viz:

(b) That the Commissioner erred in not allowing as a deduction in determining petitioner's income subject to income tax for the calendar year 1931 the sum of $23,909.29 representing selling commissions paid in connection with the sales of stocks, bonds and commodities. [18]

II

The facts upon which petitioner relies in support of this amendment to his petition and the supplemental assignment of error hereinabove set forth are as follows:

(e) Petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86; that said amount was incorrect and excessive by reason of the failure of petitioner to take a deduction for selling commissions paid in connection with the sales of stocks, bonds and commodities under the following circumstances: during the calendar year 1934 petitioner was engaged in the business of purchasing and selling stocks, bonds and commodities for profit and during said calendar year paid selling commissions in connection with such sales amounting to $23,909.29; that said selling commissions so paid as aforesaid were not taken as a deduction in computing petitioner's income tax for said year. Under Section 23(a) of the Revenue Act of 1934 and Articles 23(a)-1 and 24-2 of Regulations 86, said commissions are deductible in com-

puting petitioner's net income and petitioner claims the right to deduct the same.

Wherefore, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income tax due from petitioner for the calendar year 1934, [19] and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

HERBERT W. CLARK
LEON de FREMERY
1110 Crocker Building
San Francisco, California
WALTER SLACK
1908 Russ Building
San Francisco, California
Counsel for Petitioner [20]

State of California,
City and County of San Francisco—ss.

Adolph B. Spreckels, being duly sworn, says:

That he is the petitioner above named; that he has read the foregoing Amendment to Petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those he believes to be true.

ADOLPH B. SPRECKELS

Subscribed and sworn to before me this 23rd day of May, 1939.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires: July 30, 1939.

Granted June 8, 1939.

(Signed) R. L. DISNEY

Member U. S. Board of Tax Appeals

[Endorsed]: U. S. B. T. A. Filed at hearing June 8, 1939. [21]

[Title of Board and Cause.]

ANSWER TO AMENDMENT TO PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amendment to petition filed by the above-named petitioner, admits and denies as follows:

I. (b) Denies the allegations contained in subparagraph (b) of paragraph I of the amendment to petition.

II. (e) Admits that petitioner in making his income tax return for the calendar year 1934 showed a net income subject to Federal income tax in the sum of $121,593.86, but denies the remaining allegations contained in subparagraph (e) of paragraph II of the amendment to petition.

III. Denies generally and specifically each and every allegation in the amendment to petition not hereinbefore admitted, qualified, or denied. [22]

Wherefore, it is prayed that the Commissioner's determination be approved and that the petitioner's appeal be denied.

Signed J. P. WENCHEL
T M M
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

TMM:emb 6-9-39

[Endorsed]: U. S. B. T. A. Filed June 15, 1939. [23]

[Title of Board and Cause.]

Docket Nos. 94621, 95639.

Promulgated May 21, 1940.

FINDINGS OF FACT AND OPINION

1. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. Held, selling commissions paid to brokers were properly deducted as business expense. Neuberger v. Commissioner, 104 Fed. (2d) 649.

2. Prior to determination of deficiency, petitioner filed a claim for refund of taxes paid, on the

ground that he had not taken deduction for stamp taxes paid. In determining the deficiency, the stamp taxes were allowed as deductions, but other items resulted in determination of a deficiency. Stipulations show an overpayment of tax. At the hearing, more than three years after the last payment of tax, an amendment was filed, the effect of which was to claim, on new grounds, refund of overpayment. Held, the claim of overpayment is barred by limitations. Sec. 322(d), Revenue Act of 1934; Commissioner v. Rieck, 104 Fed. (2d) 294, and Commissioner v. Estate of George M. Dallas, — Fed. (2d) — (Mar. 25, 1940), followed.

Walter Slack, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

These proceedings, consolidated for hearing, involved originally deficiencies in income tax in the amount of $1,254.11 for the year 1934 and in the amount of $4,675.17 for the year 1935.

All of the errors raised in the original petition were disposed of by stipulation at the trial, will be reflected in computation under Rule 50, and need not further be considered herein. The issues to be examined were raised by amended petition filed in each proceeding at the hearing on June 8, 1939. Two questions are presented—first, whether a trader in securities may deduct as ordinary and necessary expense of business selling commissions paid by him, and, second, whether claim for overpayment set forth in an amended petition filed more than three years after payment of the last installment of tax is timely. The first proposition involves both

taxable years; the second only 1934, in proceeding No. 95639, in which the amended petition asks for refund of overpayment of $4,087.61. [24] In proceeding No. 94621, for 1935, the amended petition asks for refund of overpayment of $1,323.70.

A part of the facts were stipulated at trial, but since the stipulation is brief it will be incorporated in the findings of fact, which we make as follows:

FINDINGS OF FACT.

The petitioner, an individual who resides in San Francisco, California, filed his income tax returns for the years in question with the collector for the first district of California. During the taxable years he maintained an office, with employees keeping a complete set of books, which were kept and the income tax returns were made upon the basis of cash receipts and disbursements. Petitioner was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He paid to brokers selling commissions in connection with such sales as follows: In 1934, $23,692; in 1935, $2,246.25. Petitioner did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon petitioner's books the selling commissions were deducted from the selling price, before net profit or loss was determined.

Petitioner's income tax return for 1934, filed on May 9, 1935, showed a net taxable income of $121,593.86 and a tax of $37,897.60, which was paid in installments, the last payment being made Decem-

ber 16, 1935 in the amount of $9,474.40. On December 23, 1937, petitioner filed a claim for refund of income tax in the amount of $4,087.61, on the ground that certain stamp taxes were paid that had not been claimed as deductions in the return. With the exception of $80, this claim was allowed in the determination of the Commissioner in the deficiency letter, which was dated July 20, 1938. Petition to the Board was filed September 26, 1938, in proceeding No. 95639. It was stipulated that $7,828.51 may be excluded from income for 1934 as determined by the Commissioner, and that the amount of dividend credit should be reduced by $7,828.51.

Petitioner's income tax return for 1935, filed April 15, 1936, showed a net taxable income of $141,146.57 and a tax of $48,554.03, which was paid, the last installment, $12,138.50, being made December 11, 1936. Deficiency letter was dated April 7, 1938. After the filing of the petition for 1935 in proceeding No. 94621 on July 6, 1938, petitioner on March 9, 1939, filed with the collector of internal revenue at San Francisco, California, a claim for refund of income tax of $1,323.70 by reason of petitioner's failure to deduct commissions on sales of bonds, commodities, and stocks. [25]

It was stipulated that income as determined by the Commissioner for 1935 may be reduced by $9,437.24, with a reduction in the same amount in dividend credit.

Petitioner reported on his income tax return for 1934 losses of $114,249.38 from sale of stocks and

commodities, and took as a deduction $2,000; also, for 1935 the losses on commodity and stock transactions were reported as $8,009.69, and loss deducted was $2,000.

OPINION.

Disney: 1. Are selling commissions paid by a trader in securities deductible as business expense?

After the decision of the Circuit Court in Winmill v. Commissioner, 93 Fed. (2d) 494, we allowed selling commissions as well as purchasing commissions, in Harry H. Neuberger, 37 B. T. A. 223. On appeal to the Circuit Court our decision as to selling commissions was affirmed. Neuberger v. Commissioner, 104 Fed. (2d) 649. Certiorari was not applied for by the Commissioner. We think the dicta in Helvering v. Winmill, 305 U. S. 79, and in Helvering v. Union Pacific R. R. Co., 293 U. S. 282, referred to by respondent, are not decisive of the point here presented. We hold therefore that the respondent upon the point is in error, and that the selling commissions are allowable deductions.

The result, as to the year 1935 and in proceeding No. 94621, is that we find there is no deficiency and that there is an overpayment of tax by the petitioner in the amount of $1,323.70 paid on December 11, 1936, both within three years before the filing of claim therefor by amendment to the petition filed on June 8, 1939, and within three years before the filing of the claim for refund on March 9, 1939.

As to the year 1934, in proceeding No. 95639, a different situation is presented. The result of a

stipulation entered into at the hearing is that there was an overpayment for the year 1934, but the respondent objected to the filing of the amendment to the petition, on the ground that the claim of overpayment thereby advanced was not timely, being presented for the first time on June 8, 1939, more than three years after the payment of the last installment of tax. Respondent relies on Commissioner v. Rieck, 104 Fed. (2d) 294; certiorari denied, 308 U. S. 602, and the cases therein cited, and says that case bars consideration of the selling commissions as new grounds for claim of overpayment, because set up by amendment after the statute had run. Petitioner refers us to Georgie W. Rathborne, 39 B. T. A. 56. In the latter we followed our decision in Edward E. Rieck, 35 B. T. A. 1178, which was reversed by Commissioner v. Rieck, supra. In both cases we had entertained and allowed [26] claims for overpayment on new grounds set up in amended petitions, on the theory that such amendments related back to the filing of the original petition, and were therefore not within the bar of the statute. This theory is untenable since the decision of the Circuit Court in the Rieck case. Petitioner, however, seeks to avoid the effect of that decision by a contention that "The new error assigned in the amended petition does not give rise to this overpayment, but serves to prevent its reduction on account of other adjustments." He also argues:

> * * * petitioner is not asking for a refund of any taxes paid by reason of his failure to

> deduct selling commissions in preparing his 1934 income tax return, but is asking for the full allowance of a timely refund claim resulting from a failure to claim a deduction for stamp taxes paid during that year, the amount of which the respondent seeks to reduce by asserting other errors in the return. Petitioner claims the right to offset these other errors by the amount of selling commissions paid and thereby secure the full amount of his timely refund for the stamp taxes.

In other words, petitioner in effect contends that he is utilizing the claim as to deductible selling commissions, not as new ground for claim of overpayment, but merely to offset the offset which the Commissioner, by other items, set up against the original claim of overpayment on grounds of stamp taxes paid but not deducted. Thus, petitioner seems to argue, the original claim for refund, timely filed, is left alive and undiminished, and he now claims thereunder. Thus petitioner seeks by indirection to accomplish what can not be done directly. We think there is no essential difference between the situation here and in the Rieck case, for we think that petitioner is in fact relying upon new grounds for the overpayment. The amended petition, after reciting the facts as to payment of selling commissions of $23,909.29 and alleging thus deductibility concludes:

> Wherefore, petitioner prays that this Board may hear the proceeding and determine that

there is no deficiency in income tax due from petitioner for the calendar year 1934, and that petitioner has overpaid his income tax for said year in the sum of $4,087.61, and that the amount of said overpayment was paid within three years before the filing of a claim for refund of said overpayment on December 23, 1937, and within three years before the filing of the original petition herein and that this petitioner is entitled to a refund of $4,087.61.

It thus appears that claim of overpayment is in fact set up anew in the amended petition, and that the only reason therefor lies in the new facts recited—the selling commissions. We think it apparent that the selling commissions are the ground of claim of overpayment. That there is new claim of overpayment is demonstrated by the fact that the claim is for $4,087.61 instead of $3,650.36, the [27] amount of overpayment claimed in the original petition. Also, it is noteworthy that the $4,087.61 overpayment claimed in the amendment is the amount of the original refund claim, filed with the Commissioner prior to determination of deficiency. Thus it appears that petitioner is now relying, not upon his original claim of overpayment of $3,650.36, but instead upon the refund claim. But that refund claim was in effect allowed by the Commissioner, for in determining the deficiency he agreed (except as to $80) that the payment of stamp taxes, pressed as ground of the refund claim, was a deductible item, and therefore gave credit,

in effect, against the deficiency otherwise appearing, of the amount of the refund claim, with the small exception of $80. In Suhr v. United States, 18 Fed. (2d) 81, a very similar situation appears. There a claim for refund was, as here, filed prior to determination of deficiency because of claim that nontaxable stock dividends had been reported as income. After examination of the taxpayer's books the Commissioner gave the taxpayer credit for the dividends, but found a deficiency because of other matters. The taxpayer appealed to the Board, alleging that there was no deficiency, but an overpayment. He also filed an action in the Federal Court. The question was as to jurisdiction of the court. On appeal the Circuit Court said, as to the overpayment: "He was simply entitled to have the overpayment credited against his other tax liability." This seems exactly what the Commissioner did herein. We think it disposed of the original refund claim, that the petitioner here should not now be heard to rely upon that claim, and that he is in fact relying upon the new grounds as to selling commissions, barred by the statute. We find no material distinction between the situation here and that in Commissioner v. Rieck, supra. Moreover, that case has lately been approved and followed in Commissioner v. Estate of George M. Dallas, —— Fed. (2d) —— (C. C. A., 2d Cir., Mar. 25, 1940), wherein the facts were similar to those in the Rieck case. The court held that a refund of the overpayment was barred, under section

322(d) of the Revenue Act of 1932, by the lapse of more than two years before the filing of the amended petition which first set up the grounds of overpayment.

On April 30, 1940 (41 B. T. A. ——), we reconsidered the decision entered in Denholm & McKay Co., 39 B. T. A. 767, and, following Commissioner v. Rieck, supra, and Commissioner v. Estate of George M. Dallas, supra, held that an amended petition filed more than three years after payment of tax does not relate back to the time of filing of original petition, so as to authorize the crediting or refunding of an overpayment in tax attributable to a new issue raised in the [28] amended petition, under section 322 (d) of the Revenue Act of 1934, as amended.

It appearing, from evidence adduced since the filing of the amendment to the petition, that the last payment of tax had been made more than three years before the amendment, we conclude and hold that the petitioner's claim for refund of overpayment is barred by the statute of limitations. Sec. 322 (d), Revenue Act of 1934.

Decision will be entered under Rule 50. [29]

[Title of Board and Cause.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted on behalf of petition to the United States Board of Tax Ap-

peals in compliance with its opinion determining the issues in this proceeding. This computation is submitted without prejudice to the petitioner's right to contest the correctness of the decision entered herein by the Board pursuant to the statutes in such cases made and provided.

WALTER SLACK,
825 Balfour Building, San Francisco, California,
Counsel for Petitioner.

[30]

ADOLPH B. SPRECKELS

Docket No. 95639
Income tax Liability for Year ended December 31, 1934

RE-COMPUTATION OF TAX LIABILITY PREPARED IN ACCORDANCE WITH THE OPINION OF THE UNITED STATES BOARD OF TAX APPEALS, PROMULGATED MAY 21, 1940, 41 B. T. A. No. 160

Income per 90 day letter			$124,507.04
Less exclusion as stipulated			7,828.51
Net income adjusted			$116,678.53
Less: Personal exemption		$ 2,500.00	
Credit for dependents		933.33	3,433.33
Surtax net income			$113,245.20
Less: Interest on Liberty Bonds		$13,554.94	
Dividends:			
90 day letter	$101,786.71		
Reduction as stipulated	7,828.51	93,958.20	
Earned income credit		300.00	$107,813.14
Normal tax income			5,432.06

[31]

Normal tax	$ 217.28
Surtax	34,887.50
Total tax	35,104.78
Less: income tax paid at source	23.90
Correct tax liability	$35,080.88
Income assessed on original return	37,897.60
Overpayment	2,816.72

Petitioner requests that the Board determine as a part of its decision that said overpayment was paid within three years before the filing of a claim for refund, viz., that petitioner paid $9,474.40 on account of his income tax liability for 1934 on December 16, 1935, and filed a claim for refund of $4,087.61 of said taxes on December 23, 1937.

Petitioner has not in the foregoing computation given effect to a deduction for selling commissions amounting to $23,692.00 paid brokers on sales of stocks, bonds and commodities for profit during the year 1934, as the Board in its opinion held any claim for refund of the overpayment of income taxes resulting from the failure to claim such deduction is barred by Section 322 (d) Revenue Act of 1934. Petitioner reserves the right to claim by and in proceedings for review of the Board's decision that such overpayment is refundable to the extent of $1,190.89, the difference between the amount of the timely refund claimed on December 23, 1937, and the amount of the overpayment above shown.

[Endorsed]: U. S. B. T. A. Filed July 3, 1940.

[32]

United States Board of Tax Appeals
Washington

Docket No. 95639.

ADOLPH B. SPRECKELS,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

Pursuant to hearing on July 24, 1940, on alternative computations submitted by the parties under Rule 50, at which time the respondent conceded that the recomputation filed by the petitioner is correct, it is

Ordered and decided: That there is an overpayment in income tax for the year 1934 in the amount of $2,816.72, which amount was paid within three years before the filing of a claim for refund. (Section 809 (a), Revenue Act of 1938.)

Enter:

Entered Aug. 5, 1940.

[Seal] (Signed) R. L. DISNEY,
Member [33]

[Title of Board and Cause.]

PETITION FOR REVIEW OF DECISION BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Adolph B. Spreckels, the petitioner above named, by Walter Slack, his attorney of record, hereby files this his petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals rendered in the above entitled appeal on August 5, 1940 in so far as said decision failed to find that petitioner had overpaid his income tax for the year 1934 in the sum of $4,087.61 (rather than in the sum of $2,816.72, as decided by the Board), within three years before the filing of a claim for refund, and respectfully shows:

I. Venue

The petitioner, Adolph B. Spreckels, is an individual who resides in San Francisco, California. Petitioner filed [34] his federal income tax return for the calendar year 1934 with the collector for the first district of California, whose office is within the jurisdiction of said United States Circuit Court of Appeals for the Ninth Circuit, which is the court within which this review is sought.

II. Nature of the Controversy

The nature of the controversy is as follows:

Petitioner filed his federal income tax return for 1934 on May 9, 1935, showing a net taxable income

of $121,593.86 and a tax liability of $37,897.60, which was paid in installments, the last payment being made on December 16, 1935, in the amount of $9,474.40. On December 23, 1937, petitioner filed a timely claim for refund of income tax in the amount of $4,087.61 on the ground that certain stamp taxes had been paid that had not been claimed as deductions in the return. Respondent in a deficiency letter dated July 20, 1938 conceded this claim with respect to the stamp taxes, with the exception of $80, but, by reason of other adjustments, asserted a deficiency of $1,254.11 for the year. A petition for redetermination was filed with the Board on September 26, 1938 wherein error was assigned as to the other adjustments made by the respondent, and petitioner asserted that he had overpaid his income tax for the year by reason of his failure to claim a [35] deduction for the stamp taxes referred to in the refund claim of December 23, 1937.

At the hearing before the Board on June 8, 1939, petitioner was granted leave to file an amendment to his petition setting forth an additional error on the part of the respondent in failing to allow petitioner a deduction for selling commissions paid in connection with sales of stocks, bonds and commodities in the sum of $23,909.29. The amendment closed with a prayer for the refund of the $4,087.61 claimed in the refund claim filed on December 23, 1937.

The Board held that the selling commissions were legally deductible in determining petitioner's income tax liability, with the result that petitioner had in fact overpaid his income tax by more than $15,000, an amount in excess of the refund claimed on December 23, 1937. However, on the ground that the amendment assigning error in respect to the deduction for selling commissions had not been filed within three years after the payment of the last installment of tax, the Board ruled that the omitted deduction could not be given effect in determining petitioner's income tax liability for the year in question, and limited the refund on account of stamp taxes to $2,816.72, the amount of overpayment resulting from a partial disallowance of respondent's other adjustments. [36]

Petitioner asserted before the Board, and will urge on this petition for review, that the Board has jurisdiction to allow amendments at any time before trial to bring in additional specifications of error in the determination of tax liability, without regard to the elapse of the period for filing claims for refund, and that if the Board's redetermination shows an overpayment, the taxpayer is entitled to a refund of so much of the overpayment as is included in a timely and valid claim therefor.

Wherefore, petitioner prays that the United States Circuit Court of Appeals for the Ninth Circuit review the decision of the United States Board of Tax Appeals entered in the above entitled appeal on August 5, 1940, and determine that petitioner is

entitled to a refund of $4,087.61, the full amount claimed in his refund claim filed on December 23, 1937.

WALTER SLACK,
825 Balfour Building, San Francisco, California; Attorney for Petitioner.

[Endorsed]: U. S. B. T. A. Filed Oct. 19, 1940.

[37]

[Title of Board and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: J. P. Wenchel, Esq.
Chief Counsel Bureau of Internal Revenue
Washington, D. C.

Please take notice that on October 19, 1940, the above named petitioner filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the Board heretofore rendered in the above entitled appeal and entered on August 5, 1940 in so far as said decision failed to find that petitioner had overpaid his income tax for the year 1934 in the sum of $4,087.61 (rather than in the sum of $2,816.72, as decided by the Board) within three years before the filing of a

claim for refund. A copy of the petition for review [38] as filed is served on you herewith.

Dated: October 21, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[39]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF NOTICE OF FILING OF PETITION FOR REVIEW AND COPY OF PETITION FOR REVIEW

State of California
City and County of San Francisco—ss.

J. A. Poma, being first duly sworn, deposes and says:

That she is, and was at the time of the service hereinafter referred to, a resident of the City and County of San Francisco, State of California, and a citizen of the United States, over the age of twenty-one years, and not a party to nor interested in the above mentioned appeal; that the address of affiant is 2265 Larkin Street, San Francisco, California.

That on the 21st day of October, 1940, affiant deposited in the registered mail at the United States post office at [40] San Francisco, California, a duplicate original of the attached Notice of Filing Petition for Review and a copy of the Petition for Review therein referred to in a sealed en-

velope addressed to J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building, Washington, D. C.; that at the time of such deposit affiant fully prepaid the first class postage thereon and the registry fee therefor; that at the time of such deposit there was regular communication by mail between the said City and County of San Francisco and the city of Washington, D. C.

J. A. POMA

Subscribed and sworn to before me this 21st day of October, 1940.

[Seal] CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 20, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[41]

[Title of Board and Cause]

STATEMENT OF POINTS TO BE RELIED UPON BY PETITIONER ON REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS ENTERED ON AUGUST 5, 1940

Now comes Adolph B. Spreckels, the petitioner in the above entitled appeal, by his attorney, Walter Slack, and states the points upon which he in-

tends to rely on his petition for a review of the above decision, viz:

1. The Board of Tax Appeals having determined that selling commissions in the amount of $23,692.00, paid by petitioner on sales of stocks, bonds and commodities, were allowable deductions in determining petitioner's liability for federal income tax for the year 1934, with the result that petitioner had overpaid his federal income tax for that [42] year in an amount in excess of $15,000.00, and it appearing that petitioner had filed a timely claim for a refund of income tax for that year in the amount of $4,087.61, grounded upon an omitted deduction which entered into the determination of petitioner's taxable income, the Board erred in not allowing the full amount claimed.

2. The Board erred in holding, in effect, that it could not consider, in redetermining petitioner's income tax liability for the year 1934, error in that determination first asserted in an amended petition filed more than three years after the last payment of tax had been made.

3. The Board erred in deciding that the amount of the overpayment of petitioner's income tax for the year 1934 did not exceed the sum of $2,816.72.

4. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934 in an amount not less than $4,087.61.

5. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934 in an amount not less than $4,087.61 within

three years before the filing of a valid claim for refund.

6. The Board erred in failing to decide that petitioner had overpaid his income tax for the year 1934, in an amount not less than $4,087.61, within three years before the filing [43] of the petition for redetermination.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[44]

[Title of Board and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON REVIEW

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, for use in connection with the petition for review by the Circuit Court of Appeals for the Ninth Circuit heretofore filed by the petitioner in the above appeal, a transcript of the record in the above appeal, prepared as required by law and by the rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. The docket entries of all proceedings before the Board of Tax Appeals. [45]

2. Pleadings before the Board of Tax Appeals as follows:

(a) Petition for redetermination, including attached copy of deficiency notice;

(b) Answer of respondent;

(c) Application for leave to file amendment to petition and order granting same;

(d) Amendment to petition;

(e) Answer of respondent to amendment to petition, if any.

3. The findings of fact and opinion of the Board of Tax Appeals.

4. Petitioner's computation for entry of decision.

5. The decision of the Board.

6. The Petition for Review filed by petitioner in the above appeal, together with Notice of filing the same, and Proof of the service thereof.

7. Statement of Points upon which petitioner intends to rely on the review.

8. Designation of Portions of record, proceedings and evidence to be contained in the record on Review, together with proof of service of same.

Dated: October 21, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

[46]

[Title of Board and Cause.]

AFFIDAVIT OF SERVICE OF DESIGNATION OF PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON REVIEW AND OF STATEMENT OF POINTS UPON WHICH PETITIONER INTENDS TO RELY ON THE REVIEW

State of California
City and County of San Francisco—ss.

J. A. Poma, being first duly sworn, deposes and says:

That she is, and was at the time of the service hereinafter referred to, a resident of the City and County of San Francisco, State of California, and a citizen of the United States over the age of twenty-one years and not a party to nor interested in the above entitled appeal; that the address of affiant is 2265 Larkin Street, San Francisco, California.

That on the 21st day of October, 1940, affiant deposited [47] in the registered mail at the United States post office at San Francisco, California, duplicate originals of the attached Designation of portions of the Record, proceedings and evidence to be contained in the record on Review and of the Statement of Points upon which Petitioner intends to Rely on the Review in a sealed envelope addressed to J. P. Wenchel, Esq., Chief Counsel, Bureau of Internal Revenue, Internal Revenue Building,

Washington, D. C.; that at the time of such deposit affiant fully prepaid the first class postage thereon and the registry fee therefor; that at the time of such deposit there was regular communication by mail between the said City and County of San Francisco and the city of Washington, D. C.

J. A. POMA

Subscribed and sworn to before me this 21st day of October, 1940.

[Seal] CATHERINE E. KEITH

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Oct. 20, 1942.

[Endorsed]: U. S. B. T. A. Filed Oct. 25, 1940.

[48]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of

Tax Appeals, at Washington, in the District of Columbia, this 5th day of November, 1940.

[Seal] B. D. GAMBLE,
Clerk, United States Board
of Tax Appeals. [49]

[Endorsed]: No. 9682. United States Circuit Court of Appeals for the Ninth Circuit. Adolph B. Spreckels, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed November 18, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9682

ADOLPH B. SPRECKELS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Now comes Adolph B. Spreckels, the petitioner above named, and pursuant to Rule 19 of the above

court designates the entire record contained in the transcript heretofore certified by the Clerk of the United States Board of Tax Appeals and filed in the above entitled cause on November 18, 1940, as the part of the record which petitioner thinks necessary for the consideration of petitioner's petition for review in said cause.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

Consented to:

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Filed Nov. 25, 1940. Paul P. O'Brien, Clerk. [50]

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF THE POINTS ON WHICH PETITIONER INTENDS TO RELY

Petitioner, Adolph B. Spreckels, above named hereby adopts as a statement of the points on which he intends to rely on the above review the statement of points to be relied upon by petitioner on review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United States Board of Tax Appeals entered on

August 5, 1940, filed in the United States Board of Tax Appeals in the above proceeding and contained in the certified transcript of the record filed in the above cause on November 18, 1940.

WALTER SLACK,
825 Balfour Building, San Francisco, California, Attorney for Petitioner.

Service of a copy of the above Statement of Points is hereby acknowledged this 22nd day of November, 1940.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[Endorsed]: Filed Nov. 25, 1940. Paul P. O'Brien, Clerk. [51]

No. 9682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Upon Petitions to Review Decisions of the
United States Board of Tax Appeals

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, March 13, 1941.

Before: Wilbur, Garrecht and Stephens, Circuit Judges.

[Title of Cause—No. 9682]

ORDER OF SUBMISSION

Ordered petition to review herein argued by Mr. Walter Slack, counsel for petitioner, and Mr. Arthur L. Jacobs, Special Assistant to the Attorney General, counsel for respondent, and submitted to the court for consideration and decision.

[Title of Cause—No. 9687]

ORDER OF SUBMISSION

Ordered petition to review herein argued by Mr. Arthur L. Jacobs, Special Assistant to the Attorney General, counsel for petitioner, and by Mr. Walter Slack, counsel for respondent, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, May 15, 1941.

Before: Wilbur, Garrecht and Stephens, Circuit Judges.

[Title of Causes.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENTS.

By direction of the Court, Ordered that the typewritten opinion this day rendered by this court in above causes, be forthwith filed by the clerk, and that a judgment be filed in each cause and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Causes.]

Upon Petitions to Review Decisions of the United States Board of Tax Appeals.

Before: Wilbur, Garrecht, and Stephens, Circuit Judges.

Garrecht, Circuit Judge:

The taxpayer, a resident of San Francisco, was engaged in the business of purchasing and selling stocks, bonds, and commodities for profit. He maintained an office with employees, and kept a complete

set of books on the cash receipts and disbursements basis.

Adolph B. Spreckels' income tax return for 1934, which was filed with the collector for the first district of California on May 9, 1935, disclosed a net taxable income of $121,593.86 and a tax of $37,897.60; the tax was paid in installments, the last of which, in the sum of $9,474.40, was made December 16, 1935. December 23, 1937, the taxpayer filed a claim for refund of income tax in the amount of $4,087.61, upon the ground that certain stamp taxes were paid which had not been claimed as deductions in the return. The Commissioner, in the deficiency letter, dated July 20, 1938, allowed this claim, with the exception of $80. This letter from the Commissioner to the taxpayer relative to tax liability for the year 1934, however, asserted a deficiency in income tax for that year in the sum of $1,245.11, arising out of transactions not important here. Thereafter, on September 26, 1938, the taxpayer filed a petition for redetermination in the Board of Tax Appeals, alleging the deficiency to be based upon matters which are unimportant here, and contending he was entitled to refund of $3,650.36. Later, at the hearing before the Board, on June 8, 1939, the taxpayer filed an amendment to his petition, in which he asserted that during the calendar year 1934 he paid, as selling commissions in connection with sales of stocks, bonds, and commodities in the conduct of his businesss, the sum of $23,909.29 which he did not take as a deduction in computing his

income tax for the year 1934 and contended, by reason thereof, he was entitled to a refund of $4,087.61. All of the errors raised by the original petition were disposed of by stipulation at the trial. There were, therefore, but two questions before the Board: (1) Whether the selling commissions were deductible as ordinary and necessary expenses; and (2) if so, whether claim based upon such payments, filed more than three years after the last payment of tax, is timely. The Board announced an affirmative answer to the first question, but held that the claim for refund was barred by the statute of limitations. Section 322(d) of the Revenue Act of 1934, 48 Stat. 680, 751.

The taxpayer's income tax return for 1935, filed April 15, 1936, disclosed a net taxable income of $141,146.57 and a tax of $48,554.03; the tax was paid in installments, the last of which, in the sum of $12,138.50, was made December 11, 1936. A deficiency letter, dated April 7, 1938, addressed to Adolph B. Spreckels by the Commissioner, stated a deficiency of $4,675.17 was disclosed in his income tax liability for 1935. July 6, 1938, the taxpayer filed a petition in the Board of Tax Appeals for redetermination of this deficiency. The errors alleged in this petition are unimportant, for they were also disposed of at the trial by stipulation. An amendment to this petition was also filed at the hearing on June 8, 1939, also raising the question of deductibility of the selling commissions as ordinary and necessary expenses. The Board held in

favor of the taxpayer and entered its decision to the effect that there was an overpayment in income tax for the year 1935 in the sum of $1,490.10, which amount was paid within three years before filing of the amended petition.

The two petitions were consolidated for hearing and were disposed of by the Board in a single opinion, although separate decisions were entered.

In 1934 the taxpayer paid brokers selling commissions of $23,692 in connection with sales of stocks, bonds, and commodities, and in 1935, $2,246.25, in like transactions. He did not deduct the selling commissions in computing income in making his income tax returns for the taxable years. Upon taxpayer's books the selling commissions were deducted from the selling price before the net profit or loss was determined. In his income tax return for 1934 the taxpayer reported losses of $114,249.38 arising out of sales of stocks and commodities, and took a deduction of $2,000; in 1935 he reported losses of $8,009.69 arising out of like transactions and took a deduction of $2,000 thereon.

Separate petitions for review of the Board's decisions were taken with respect to the tax liability for the year 1934 and for the year 1935; the taxpayer is the moving party so far as 1934 is concerned, while the Commissioner brings the 1935 tax liability problem before us. Both petitions will be considered together because the basic question before this court in each case is identical; only in the event that our conclusion on deductibility is in the

taxpayer's favor will it be necessary to consider whether the claim for refund for 1934 was timely filed.

It is provided by Section 23(a) of the Revenue Act of 1934, 48 Stat. 680, 688, that "In computing net income there shall be allowed as deductions: . . . All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . ." This is the provision of the taxing Act which has direct application to the present situation.

Our principal concern here is whether purchasing and selling commissions paid by the taxpayer, engaged in the business of buying and selling securities, are deductible as ordinary and necessary expenses, or must be figured, respectively, as additions to cost or offsets against selling price.

Incidental to the Commissioner's authority to administer the income tax law is the power to make regulations for the information of the taxpayers, the guidance of the collectors, and the realization of purposes of the taxing acts. Section 62 of certain of the later Revenue Acts (notably, 1934, 48 Stat. 680, 700) furnishes specific authority for the publication of such regulations and under that section was published Regulations 86, relating to the income tax under the Revenue Act of 1934. Regulations 86, referring to Section 23(a) of the 1934 Act, quoted above, says, "Among the items included in business expenses are * * * commissions, * * *"

This simple, general statement, is not decisive, for this article concludes with the sentence, "As to items not deductible under any provision of section 23, see section 24," and Article 24-2 of the same Regulations provides, in part, that:

> "* * * Commissions paid in purchasing securities are part of the cost price of such securities. Commissions paid in selling securities, *when such commissions are not an ordinary and necessary business expense,* are an offset against the selling price." [Italics are by the Court.]

The qualifying clause, which we have emphasized, first appeared in Regulations 77, article 282, covering the Revenue Act of 1932. For several years prior to the publication of Regulations 77, the statement referring to purchasing and selling commissions appeared in the Regulations substantially as written above, without the qualifying clause. As early as Regulations 33, par. 108 (respecting the Revenue Acts of 1913 and 1916), the following definition was in effect:

> "Commissions paid in purchasing and selling securities are a part of the cost or selling price of the securities and not otherwise deductible. They do not constitute expense deductions in a return of income."

Hutton v. Commissioner, 5 Cir., 39 F2d 459, treated, and denied, the deductibility of purchase commissions as ordinary and necessary business

expenses under the Revenue Act of 1921, under which Regulations 62, art. 293, provided as in the 1934 Act, with the exception, of course, of the qualifying clause, not included in those Regulations. The court concluded purchasing commissions were part of the cost of the securities and not deductible as ordinary and necessary expenses.

The provision of Article 23(a)-1 must be read in conjunction with the provisions of Article 24-2 of Regulations 86, applicable here, in order to give recognition to both and do violence to neither. Undoubtedly, the clause, "when such commissions are not an ordinary and necessary business expense," refers to that part of Article 23(a)-1 of Regulations 86, quoted above. It will be noted, however, and it is to be stressed, that the part of Article 24-2 to which we have reference is *specific,* as opposed to the general nature of the reference to "commissions" in Article 23(a)-1, and therefore should control. Helvering v. Winmill, 305 US 79, 83-84.

An opinion was requested of the General Counsel of the Bureau of Internal Revenue on, for all practical purposes, the identical question here involved, under the same section of the 1934 Act and the same Articles of Regulations 86. The opinion (Internal Revenue Bulletin, Cum.Bull. XIV-2, p. 59, XIV—38—7698, G.C.M. 15430) said:

> "The question as to the deductibility of such commissions involves three classes of taxpayers

—(1) a dealer in securities, (2) a trader in securities, and (3) a taxpayer who purchases and sells securities occasionally but not in such quantities or under such circumstances as to constitute him either a dealer or a trader. * * *

"Fundamentally, commissions paid in connection with both purchases and sales of securities, being direct expenses of acquiring and disposing of the property, are direct charges against the profit, or increase the loss, arising from the transaction. * * *

* * * * * *

"* * * there can be no justification for a departure from that method of treatment except in those cases where the detail of accounting on that basis is so burdensome as to make its use impracticable. No such accounting difficulties exist in the case of any of the three classes of taxpayers enumerated above, except the *dealer** Both the occasional seller and the trader are required to account in their income tax returns for the profit or loss on each individual sale. The right to inventory securities is denied to the trader and to the occasional seller. (See article 22(c)-5, Regulations 86.) * * *"

The opinion then continues to explain that no difficulty is experienced by either of the latter two classes of taxpayers in accounting by adding purchasing commissions to the cost of the securities and deducting selling commissions from the selling

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*Italics are by the Court.

price thereof and that the dealer, also, experiences no difficulty in adding the purchase commissions to the cost of securities, but that the volume of his sales and the numerous selling transactions make it impracticable from the accounting standpoint to match selling commissions against each individual sale. Because of this factor, so reasons the opinion, the dealer is permitted to inventory securities and "to treat his selling commissions as 'ordinary and necessary business expenses,' not because they are technically such but because of practical considerations." No formal recognition of this interpretation was given, says the opinion, until the qualifying clause was inserted in Article 282 of Regulations 77. The opinion concludes with this statement:

> "Selling commissions are an offset against the sale price and are not deductible as ordinary and necessary business expenses, except in the case of a dealer in securities."

We are moved to comment that the interpretation of the regulations by the Assistant General Counsel of the Bureau of Internal Revenue appears intelligent, logical, and reasonable. Moreover, it is but the statement of a long-continued construction of law and regulation by the administrative officers charged with the enforcement thereof.

Regulations 86, in providing for inventories by dealers in securities (art. 22(c)-5) defines "dealer in securities" as "a merchant of securities, . . . with an established place of business, regularly en-

gaged in the purchase of securities and their resale to customers; that is, one who as a merchant buys securities and sells them to customers with a view to the gains and profits that may be derived therefrom." This regulation continues—"the securities inventoried as here provided may include only those held for purposes of resale and not for investment. Taxpayers who buy and sell securities for investment or speculation, . . . are not dealers in securities within the meaning of this rule." These Regulations do not specifically define a "trader." While the Board did not find that the taxpayer was a "trader," it referred to him as such in its opinion, to which statement there was, apparently, no objection. We think, on the record made, that the taxpayer was not a "dealer in securities." Definitely, he was not an occasional purchaser and seller. It would seem to follow, from the exclusion of the two extremes, neither of which classifications fits the business of the taxpayer, that he was a "trader."

If the modifying clause applies only to "dealers in securities," as the regulations seem to indicate, then it does not apply to the taxpayer, because he is not a "dealer" as defined by the same Regulations 86. If the clause had not been inserted in the regulation, the long-continued administrative construction and the adherence by the Congress to the original wording in the re-enactment of Revenue acts, would render the Commissioner's position unassailable. The question then arises, "Why was the clause inserted in an already clear regulation?"

The explanation seems to be that it was placed there for the protection of "dealers," who were compelled, as a matter of accounting practice, to inventory their securities.

In Winmill v. Commissioner, 93 F2d 494, 496, the Circuit Court of Appeals for the Second Circuit had before it the question whether buying and selling commissions were deductible as ordinary and necessary expenses under the Revenue Act of 1932. 47 Stat. 169. The statutory provisions and the regulations (77) were similar to those here involved. The Court of Appeals, in the Winmill case, uncertain whether the taxpayer was engaging in a trade or business, referred to him as a "dealer," and held that if he was engaging in a trade or business, "the commissions paid in the purchase and sale of securities are an expenditure of carrying on that business." In the course of its discussion the court attempted to distinguish certain language appearing in Helvering v. Union Pacific RR. Co., 293 US 282, 286, by stating that the questions there presented "dealt with deductions of commissions on bonds issued by taxpayer itself. The court there approved the regulation providing for the capitalization of the commissions involved." The pertinent language of the Supreme Court in the Union Pacific case is as follows:

> "* * * In this respect the commissions [paid for marketing bonds] do not differ from brokerage commissions paid upon the purchase or

sale of property. The regulations have consistently treated such commissions, not as items of current expense, but as additions to the cost of the property or deductions from the proceeds of sale, in arriving at net capital profit or loss for purposes of computing the tax."

The Circuit Court of Appeals remanded the case to the Board to make a finding whether the taxpayer was engaging in a trade or business. On petition of the Commissioner the Supreme Court granted certiorari in the Winmill case. The high court confined its discussion (305 US 79, 84) to purchase commissions, which it held not deductible as an expense, irrespective of whether the taxpayer was engaged in the business of buying and selling securities, and remanded the case to the Circuit Court of Appeals. The Supreme Court's opinion did not treat the question of selling commissions, but did quote with approval the language of the Union Pacific case, supra. The citator does not reveal any subsequent opinion in this case by the Circuit Court of Appeals.

Thereafter, another case involving this problem, inter alia, was presented to the same Circuit Court of Appeals, Neuberger v. Commissioner, 2 Cir., 104 F2d 649, 650. In a per curiam opinion the court conformed to the Supreme Court's ruling in the Winmill case in respect to purchase commissions, but, without discussion, adhered to its former conclusion respecting selling commissions. The tax-

payer petitioned the Supreme Court for issuance of a writ of certiorari, which was denied, 308 US 623. Thereafter, a petition for rehearing was granted by the Supreme Court and the order denying the petition for writ of certiorari was vacated, 310 US 655. The petition for writ of certiorari was granted, limited to certain questions not material here. The Supreme Court's decision in the Neuberger case, 311 US 83, does not discuss, nor decide, any phase of our problem, and therefore it is of no assistance here.

Our attention, likewise, has been drawn to an opinion of the Board of Tax Appeals in the appeal of Alice duPont Ortiz, 42 BTA . . . , promulgated June 21, 1940, wherein it is held, upon the authority of the opinions of the Circuit Court of Appeals for the Second Circuit in the Winmill and Neuberger cases, supra, that one engaged in purchasing and selling securities as a business is entitled to deduct selling commissions as an expense.

No compelling reason, however, presents itself to us for treating purchasing commissions, concededly non-deductible as expenses, differently from selling commissions. If the purchase commissions are to be regarded as a part of the cost of the securities, then, logically, the selling commissions should be considered as an offset against the sale price. Ordinarily the trader or occasional seller calculates each individual sale with reference to profit or loss, and as he normally includes the purchase commissions in the calculation of the cost, so he

fixes his asking price with due regard to the cost of disposal; else how would he know whether profit or loss was to be his realization? The Supreme Court has never passed squarely upon the precise question here before us, but it has shown a disposition to adhere to the reasoning expressed in the Union Pacific case, supra, and until that language, heretofore quoted, is repudiated or overruled, we feel obliged to hold that selling commissions, except in the case of a dealer in securities, are not deductible as expenses, but must be considered as an offset against selling prices.

The decision of the Board of Tax Appeals on the Commissioner's petition for review in case No. 9687, with respect to income tax liability for the year 1935, is reversed. The decision of the Board in case No. 9682, respecting the 1934 return, is affirmed, because the claimed additional refund was based upon selling commissions which we hold not deductible as expenses.

[Endorsed]: Opinion. Filed May 15, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 9682

ADOLPH B. SPRECKELS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

JUDGMENT

Upon Petition to Review a Decision of the United States Board of Tax Appeals,

This Cause came on to be heard on the Transcript of the Record from the United States Board of Tax Appeals and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Board of Tax Appeals in this Cause be, and hereby is affirmed.

[Endorsed]: Filed and entered May 15, 1941. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, July 28, 1941.

Before: Wilbur, Garrecht and Stephens,
Circuit Judges.

[Title of Causes.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, it is ordered that the petition of Adolph B. Spreckels, filed June 13, 1941, for a rehearing of above causes, and filed within time allowed therefor by rule of court, be, and hereby is denied.

[Title of Circuit Court of Appeals and Causes.]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Walter Slack, counsel for Adolph B. Spreckels, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandates of this Court in the above causes be, and hereby is stayed to and including September 6, 1941; and in the event the petitions for writs of certiorari to be made by Adolph B. Spreckels herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandates of this Court are to

be stayed until after the said Supreme Court passes upon the said petitions.

FRANCIS A. GARRECHT
United States Circuit Judge

Dated: San Francisco, California, Aug. 2, 1941.

[Endorsed]: Filed Aug. 2, 1941. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing Sixty-eight (68) pages, numbered from and including 1 to and including 68, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the petitioner, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 20th day of August, 1941.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 20, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.